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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6397

WILLIAM GIBBS HYMAN,

PETITIONER,

vs

DANIEL R. McLEOD, SOUTH CAROLINA ATTORNEY GENERAL,

RESPONDENT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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PETITIONER'S QUESTIONS PRESENTED FOR REVIEW

I.

Was a claim of ineffective assistance made when a defendant shows: (1) That he did not receive representation within the range of competence demanded of attorneys in criminal cases; and (2) that counsel's failings impaired the presentation of his defense without regard to whether the outcome would necessarily have been different?

II.

Did the South Carolina Courts err in excluding at Petitioner's Post Conviction Relief trial the testimony of a juror who had been excused at trial for his opposition to the death penalty, and who was prepared to testify at the Post Conviction Relief trial that he could have considered imposition of the death penalty, and could vote to impose it, even though he was generally against the death penalty, but that he was never asked questions at trial which would have elicited these answers?

TABLE OF CONTENTS

	Pages
Petitioner's Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Constitutional and Other Provisions Involved	2
Counter-Statement of the Case	2
Reasons for Denying the Writ	7
Conclusion	10

TABLE OF AUTHORITIES

Cases	Pages
McMann v. Richardson, 397 U.S. 759 (1970) . .	8
Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975)	10
Strickland v. Washington, cert. granted, U.S. , 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983); (No. 82-1554)	7, 8
Statutes	
28 U.S.C. § 1257(3)	1
§ 16-3-20, CODE OF LAWS OF SOUTH CAROLINA (1976)	2
§ 17-27-10, CODE OF LAWS OF SOUTH CAROLINA (1976)	10

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The Respondent, above named, prays that the Petition to review the judgment of the Supreme Court of South Carolina entered in the above styled case be denied.

OPINIONS BELOW

The opinions of the Supreme Court of South Carolina denying Petition for Writ of Certiorari to review the action of the Post Conviction Relief trial court judge, and in denying a rehearing on its decision to deny Petition for Writ of Certiorari are not reported. These decisions are appended to the Petition for Certiorari at 2A and 3A.

JURISDICTION

The opinion of the Supreme Court of South Carolina denying Petition for Writ of Certiorari was entered on December 5, 1983. A timely Petition for Rehearing was denied on January 10, 1984. This Court has apparent jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are the Fourteenth, Fifth, Sixth, and Eighth Amendments to the United States Constitution. These provisions and the South Carolina Death Penalty Statute, Section 16-3-20, et seq., CODE OF LAWS (1976), as amended, are set forth verbatim in an Appendix to the Petition for Certiorari at page 7A.

COUNTER-STATEMENT OF THE CASE

This matter comes before this Court pursuant to a Petition for Certiorari from a denial of an application for post conviction relief in the South Carolina courts. The Petitioner was convicted of murder and armed robbery and sentenced to death. The background of the case reveals the following incidents. (PCR Tr. pp. 1526-1527). On the night of March 24, 1979, Petitioner Hyman and four other persons travelled from North Charleston, South Carolina, to the home of two elderly men, Teagus and Collins Griffis, in Ravenel, South Carolina. They intended to rob the home either by deception or violence. Hyman's wife, Doris, and Susan Allday knocked on the door of the trailer, but were unable to entice the men outside. Thereafter, the Petitioner, Allday, and Robert Hinson went back to the trailer door. It was opened by the occupants, and one of the Griffis brothers shot Hinson. A melee ensued and Collins Griffis was struck in the head several times, his blood was splattered throughout the trailer, and Teagus Griffis was shot in the chest with a shotgun and died. Hyman and the others were arrested and charged with murder and armed robbery on or about April 1, 1979. His family, through his brother, retained Mr. Demetrious J. Stratos to represent the Petitioner and his wife. Mrs. Hyman subsequently obtained other counsel.

On July 9, 1979, Judge Clyde Eltzroth denied a motion by Hyman to have Mr. Stratos relieved and requested the Clerk to appoint an additional attorney. On July 9, 1979, formal notice to seek the death penalty was made. Mr. Landon Louthian was finally appointed to represent him around July 24, 1979. Prior to trial, the Solicitor offered a plea bargain whereby the State would abandon its request for the death penalty in return for a guilty plea to murder. Each attorney met with the Petitioner and advised him that it would be in his best interest to plead guilty. The family was consulted and informed of counsel's advice to plead guilty. The Petitioner refused and the Court was informed. The case proceeded to trial on October 8, 1979, and Hyman was convicted of murder and armed robbery. On October 12, 1979, following a mitigation phase, the jury sentenced him to the death penalty.

The appeal was perfected to the Supreme Court. In its opinion, the Court made the following findings of fact and conclusions of law as they pertained to the issue of ineffective assistance of counsel:

> Appellant's claims are insufficient to show that justice was not done. He has not shown how counsel's alleged deficiencies affected the outcome of trial ... . We conclude there is no evidence of probative value supporting appellant's contention that he was denied the effective assistance of counsel. State v. Hyman, 281 S.E.2d 209, 213 (1981).

In the post-conviction proceeding, the crucial issue concerned the adequacy of counsel's representation. A review of the testimony of each attorney and the deposition set out the factual predicate for the resolution of the issue.

Mr. Stratos testified he was retained by the Petitioner's brother, Phillip Hyman, shortly after the Petitioner was arrested in April of 1979. (PCR Tr. p. 40).

Although Mr. Stratos did not own current volumes of the South Carolina Reports, South Carolina Digest, or Southeastern Reporter, etc., he had access to these books prior to the trial of this case. (PCR Tr. pp. 40, 242-243). Counsel testified that he did not now have a file on Hyman. (PCR Tr. p. 40). However, prior to trial, he obtained and reviewed various documents, statements, indictments arrest warrants, etc., and turned them over to co-counsel who maintained the file. (PCR Tr. pp. 41, 57, 69, 76, 252). Mr. Stratos testified he met with him at the county jail on numerous occasions and spent considerable time discussing with Petitioner the facts and circumstances surrounding his case. (PCR Tr. pp. 43, 51). Mr. Stratos testified that he did not visit Petitioner in jail from July 24, 1979, until October 1, 1979, but that he was well aware of the facts and circumstances of the case and did not obtain any new information when he visited Hyman on numerous occasions between October 1, 1979, to October 9, 1979. (PCR Tr. p. 103).

Mr. Stratos testified that based on the facts as related to him by Hyman and as discovered through his investigation he advised Petitioner to plead guilty to the crime of murder in exchange for a life sentence. (PCR Tr. p. 255). To this Hyman responded he would not plead guilty because he did not kill Teagus Griffis. (PCR Tr. pp. 49-51). Mr. Stratos testified he explained the theory "the hand of one is the hand of all" to Petitioner on numerous occasions. (PCR Tr. p. 258). Counsel spoke with and obtained statements from the State's primary witnesses, and he was present at Hyman's preliminary hearing. (PCR Tr. pp. 54-55). He testified that the Solicitor's file was available to him and that he reviewed it. Mr. Stratos testified he knew of the existence of Red Coulston, but

based on information given him by Hyman concerning criminal involvement between the two, did not feel Coulston would testify for the State. (PCR Tr. pp. 81-84). Mr. Stratos reviewed the statements of the State's primary witnesses with Hyman to help prepare him to testify as well as to convince him to plead guilty. (PCR Tr. p. 267). Counsel forwarded these statements to Hyman's family in the hope they would persuade Hyman to change his plea. (PCR Tr. p. 267). Mr. Stratos testified he spent a considerable amount of time prior to trial locating and attempting to locate defense witnesses to substantiate certain aspects of the Petitioner's story. (PCR Tr. pp. 268-269).

Mr. Stratos testified that in preparation for trial he went over the facts three to four hundred times and rehearsed his jury argument for many hours. (PCR Tr. p. 90). He obtained and reviewed the jury list prior to trial. (PCR Tr. pp. 94-96). Counsel testified his theory of the case was basically Hyman's and his wife's word against that of the other three accomplices on the issue of who the triggerman was. In furtherance of this, Mr. Stratos prepared the Petitioner to testify in his own behalf. (PCR Tr. p. 101). Counsel acknowledged that this theory was geared more for the sentencing phase of the trial than the guilt phase, as Hyman had no defense as to guilt. (PCR Tr. pp. 104-106).

Co-counsel Landon Louthian received notice of his appointment on July 24, 1979. (PCR Tr. p. 860). He telephoned Mr. Stratos and discussed background and the facts and circumstances surrounding this case. (PCR Tr. p. 861). Within a few days Mr. Louthian visited Petitioner in jail and discussed the case with him. Mr. Louthian testified that although he explained the "hand of one is the

hand of all" theory to Petitioner at least twice, Petitioner still refused to plead guilty. (PCR Tr. pp. 862-864).

Mr. Louthian met with a number of Petitioner's family members. (PCR Tr. pp. 864-865). Included among them were Becky Fain and Gracie Smith, two of Petitioner's sisters. He attempted to obtain support and assistance from them to mobilize the family in preparation for trial. (PCR Tr. p. 867). Counsel questioned various family members, as well as the Petitioner, concerning any prior emotional, drug or alcohol problems the Petitioner may have had, and it was at his suggestion that Petitioner was sent to the South Carolina State Hospital for evaluation. (PCR Tr. pp. 872-873).

Mr. Louthian talked with most, if not all, of the witnesses presented in mitigation prior to their testifying. (PCR Tr. pp. 874-877). He reviewed with them basically the areas he wished them to cover. Counsel testified he was prepared for and expected additional family members to testify during the sentencing phase. Mr. Louthian also expected various members of the family to bring additional witnesses such as neighbors, Petitioner's employer, etc., as they had informed him they "would see to it" these people were brought to Court. When these family members, as well as the additional witnesses, did not voluntarily appear in Court, Mr. Louthian testified he did not feel it would be in Petitioner's best interest to force these individuals to testify.

Mr. Louthian testified that he reviewed Petitioner's testimony and went over potential cross-examination with him. He felt Petitioner's only chance at both the guilt and sentencing phase of trial was for Petitioner to take the stand. (PCR Tr. pp. 870-873). (See: Hyman's sentencing testimony, App. Tr. pp. 464-475.)

In addition, counsel testified he discussed the case with various police officers and was aware of Collins Griffis' background and history through contact with a neighbor. Of much importance, he read the South Carolina Death Penalty Statute prior to the trial many times and did legal research. (PCR Tr. pp. 869-870).

REASONS FOR DENYING THE WRIT

This litigation concerns the collateral attack in the state court system of the representation received by a convicted murderer on death row in South Carolina since October 17, 1979. The Petitioner was represented by two counsel, one retained by his family and assisted by a later court-appointed counsel, who together adequately prepared the case for trial, but they were unsuccessful in avoiding the death penalty for their client. The state post conviction relief court found the following:

> Applicant has failed to demonstrate any specific prejudice attributable to errors of omission or commission committed by trial counsel ... . Applicant's conviction and sentence were not the result of any deficiencies on the part of trial counsel. Rather, the conviction and sentence were the result of the facts and circumstances of the crime. I find Applicant has failed to establish that trial counsel's representation fell outside of the normal range of competency demanded of criminal lawyers, and accordingly, I find that trial counsel's representation was effective. (App. pp. 4A, 44-45).

The issue as presented in this case must be determined to be narrow and unique in its facts. The legal issue surrounding his ineffective counsel claim is currently before this Court in Strickland v. Washington, cert. granted, __U.S.__, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983) (No. 82-1554). This legal issue in the present case is no different than the hundreds of challenges to the effective counsel claims being

raised throughout the United States in state or federal courts pending the decision in Strickland v. Washington, supra. On the facts as presented to the South Carolina courts, the decisions below are clearly correct and in line with this Court's decisions concerning the constitutional right to counsel. No amount of rhetoric can convert it into one warranting review on certiorari. Manifestly, there is no important question of constitutional law requiring review by this Court.

His second issue before this Court concerns the exclusion of proffered testimony by a juror at the Petitioner's trial who had been excused for his opposition to the death penalty. The Petitioner merely seeks to re-open the record in cases and allow jurors who were struck for cause, properly on the record, to testify in later proceedings to impeach their original responses at trial. This was resolved solely as a matter of state evidence law and also does not justify review in certiorari nor present any federal question.

1. The Decision Below Gave Full Consideration To The Issues and Decided Them Correctly.

The lower court's decision rested upon the court's application of the "normal competency standard" set out in McMann v. Richardson, 397 U.S. 759 (1970). The lower court found that the asserted inactions of counsel were the result of informed professional deliberation rather than neglect or ignorance on each of the specific allegations raised. (PCR Tr. pp. 1541-1570). In this case, the court adopted a standard of prejudice whereby the petitioner was required to prove that the actions or omissions of his two counsel affected the outcome of his trial or the severity of his sentence. Clearly, no prejudice could be shown as affecting

the outcome of the trial because in the post conviction relief hearing the Petitioner testified that they were at the victim's home to try to get the "old men" to come out to "try to get money from them." (PCR Tr. p. 791). He further acknowledged hitting the living victim with the shotgun at least three times, though he continued to deny that he murdered Teagus Griffis as he did during his trial. (PCR Tr. p. 795). (Trial Tr. p. 469). The lower court specifically rejected each of the Petitioner's contentions against counsel by making adverse factual findings or legal conclusions. Whether or not the decision below was correct on the particular standard of prejudice, the Petitioner's arguments based upon the adverse factual findings are incorrect. This case simply does not merit review by this Court.

2. A Review By This Court Of The Second Issue Would Only Involve Questions Of Evidence Applied Under Familiar Legal Rules.

The second issue concerns the decision by the lower court to preclude the testimony of Manigault Jenkins, a juror struck for cause because of his unalterable opposition to the death penalty, in the post conviction relief hearing. During the trial, the juror advised the court that "I do not believe in the death penalty" and that he would automatically vote against the death penalty and that under no circumstances could he vote for the death penalty as a juror. (Trial Tr. pp. 601-602). The post conviction relief court disallowed his testimony proffer to show that he could have been rehabilitated in 1982. The court's rejection rested upon a sound basis that jurors cannot testify as to deliberations, impeachment of the verdict, or to contradict the record under South Carolina

law on evidence. In this unique and novel approach, Petitioner sought to re-open voir dire of jurors many years after the trial to determine if their attitude had changed (or could have been changed). (PCR Tr. pp. 408-504). Continued pursuit of the jurors' testimony would have had no bearing on any ground properly before the court as a matter of state law under the Uniform Post Conviction Procedure Act. Section 17-27-10, et seq., CODE OF LAWS (1976). The issue concerning the disqualification of a juror was a matter for direct appeal, not post conviction relief under state law. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975). This is not an issue of constitutional law which deserves this Court's further attention.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

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By: _____
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April 6, 1984

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

PERSONALLY appeared before me, Donald J. Zelenka, Assistant Attorney General, who being duly sworn, deposes and says that he is a member of the Bar of this Court; that the Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina was deposited in the United States mail, first class postage prepaid, addressed to the Clerk, United States Supreme Court, 1 First Street, Washington, D. C. 20543, this 6th day of April, 1984.

DONALD J. ZELENKA

SWORN to before me this 6th
day of April, 1984.

(LS)
Notary Public for South Carolina
My Commission Expires: Jul. 8, 1991